NO. 88-6066

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PAUL C. MILDWIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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EDITOR'S NOTE:

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QUESTIONS PRESENTED

The questions presented by Hildwin are as follows:

> WHETHER IN PROFFITT V. FLORIDA THIS COURT RESOLVED EVERY POSSIBLE CONSTITUTIONAL CHALLENGE THAT COULD EVER BE MADE AGAINST FLORIDA'S DEATH PENALTY PROCEDURE?
>
> WHETHER FLORIDA'S DEATH SENTENCING PROCEDURE VIOLATES THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?
>
> WHETHER, ONCE A PERSON HAS BEEN FOUND GUILTY OF A CRIME THE STATE MAY IN IMPOSING THE DEATH PENALTY DECREASE THE DUE PROCESS PROTECTIONS AFFORDED BY THE SIXTH AND FOURTEENTH AMENDMENTS?

Respondent has restated the question as follows:

> WHETHER FLORIDA'S CAPITAL SENTENCING PROCEDURE, WHEREIN THE JUDGE, RATHER THAT THE JURY, EXPRESSLY DETERMINES THE PRESENCE OF STATUTORY FACTORS WHICH AUTHORIZE IMPOSITION OF THE DEATH PENALTY, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND WHETHER THIS QUESTION IS PROPERLY PRESENTED WHERE PETITIONER FAILED TO COMPLY WITH FLORIDA'S PROCEDURAL RULES BY FAILING TO PRESENT IT TO THE STATE TRIAL COURT.
>
> (RESTATED)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGES

OTHER AUTHORITIES

OPINION BELOW.

Petitioner, Paul C. Hildwin ("Hildwin"), seeks review of the decision of the Supreme Court of Florida, Hildwin v. State, 531 So.2d 124 (Fla. 1988), in which the court unanimously affirmed his conviction of first degree murder and sentence of death. A copy of this opinion is included in the appendix to this pleading (See Resp. App. A).

JURISDICTION.

Hildwin seeks review pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Hildwin contends that the Sixth and Fourteenth Amendments to the United States Constitution are implicated, as well as sections 782.04 and 921.141, Florida Statutes (1987). (See Pet. App. B).

STATEMENT OF THE CASE.

i. Statement of the Facts.

Respondent, the State of Florida ("The State"), finds the most accurate statement of the case, as well as of the facts, to be that recounted by the Supreme Court of Florida in its opinion. Accordingly, respondent would set forth the following:

> Appellant [Hildwin] was arrested after cashing a check purportedly written to him by one Vronzettie Cox, a forty-two-year-old woman whose body had been found in the trunk of her car, which was hidden in dense woods in Hernando County. Death was due to strangulation; she also had been raped. Evidence indicated she had been killed in a different locale from where her body was found. Her purse, from which some contents had been removed, was found in dense woods, directly on line between her car and appellant's house. A pair of semen-encrusted women's underpants was found on a laundry bag in her car, as was a sweat-stained wash rag. Analysis showed the semen and sweat came from nonsecretor (i.e., one who does not secrete blood into other bodily fluids). Appellant, a white male, was found to be a nonsecretor; there was testimony that white male nonsecretors make up eleven percent of the population.
>
> The victim had been missing for four days when her body was found. The man she lived with, one Haverty, said she had left their home to wash clothes at a coin laundry. To do so, she had to pass a convenience store. Appellant's presence in the area of the store on the date of her disappearance had come about this way: He and two women had gone to a drive-in movie, where they had spent all their money. Returning home early in the morning, their car ran out of gas. A search of the roadside yielded pop bottles, which they redeemed for cash and bought some gasoline. However, they still could not start the car. After spending the night in the car, appellant set off on foot at 9 a.m. toward the convenience store near the coin laundry. He had no money when he left, but when he returned about an hour and a half later, he had money and a radio. Later that day, he cashed a check (which he later admitted forging) written to him on Ms. Cox's account. The teller who cashed the check remembered appellant cashing it and recalled that he was driving a car similar to the victim's.
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> The check led police to appellant. After arresting him the police searched his house, where they found the radio and a ring, both of which had belonged to the victim. Appellant gave several explanations for this evidence and several accounts of the killing, but at trial testified that he had been with Haverty and the victim while they were having an argument, and that when Haverty began beating and choking her, he left. He said he stole the checkbook, the ring, and the radio. Haverty had an alibi for the time of the murder and was found to be a secretor.
>
> Appellant made two pretrial statements that are pertinent here. One was a confession made to a cellmate. The other was a statement made to a police officer to the effect that Ms. Cox's killer had a tattoo on his back. Haverty had no such tattoo, but appellant did.
>
> During the penalty phase the state introduced evidence that appellant previously had been convicted of violent

> felonies in New York and that he was on parole. Appellant's case consisted of testimony from his father, a couple that had raised him after his father had abandoned him, and a friend. The thrust of their testimony was that he had not been a violent person in their dealings with him. In rebuttal the state called a woman who testified that appellant had, five months before Ms. Cox was murdered, committed sexual battery on her. She admitted she had not reported the crime. The jury recommended death by a unanimous vote.
>
> In his order imposing the death sentence, the trial judge found four aggravating circumstances: that appellant had previous convictions for violent felonies; that appellant was under a sentence of imprisonment at the time of the murder; that the killing was committed for pecuniary gain; and that the killing was especially heinous, atrocious, and cruel. He found nothing in mitigation.

Hildwin v. State, 531 So.2d at 125-126.

ii. How The Federal Question Was Raised And Decided Below.

Hildwin raised this question -- that the sentencing jury in Florida should expressly determine the presence of statutory factors which authorize imposition of the death penalty -- for the first time in his direct appeal to the Supreme Court of Florida, although Florida procedure requires initial presentation of a claim of this nature to the trial court. See, Trushin v. State, 425 So.2d 1126 (Fla. 1982); Eutzy v. State, 458 So.2d 755 (Fla. 1984), cert. denied, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985). In the Supreme Court of Florida, the state argued that the claim was procedurally barred due to petitioner's failure to properly present or preserve it; in the alternative, the state addressed the merits. (See Resp. App. B). In his reply brief, Hildwin did not dispute the assertion that he had never presented this matter to the circuit court, asserting instead that any error was fundamental. (See Resp. App. B).

In its opinion affirming petitioner's conviction and sentence of death, the Supreme Court of Florida did not address this issue, except to state, "We reject without discussion

Hildwin's other arguments,... [inter alia,] that the death penalty was unconstitutionally imposed because the jury did not consider the elements that statutorily define the crimes for which the death penalty may be imposed." Hildwin, 531 So.2d at 129. The concluding sentence of the opinion reads,

> As we find no merit in any of appellant's arguments, we affirm the judgement of guilt and sentence of death.

Id.

REASONS FOR DENYING THE WRIT.

> FLORIDA'S CAPITAL SENTENCING PROCEDURE WHEREIN THE JUDGE, RATHER THAN THE JURY, EXPRESSLY DETERMINES THE PRESENCE OF STATUTORY FACTORS WHICH AUTHORIZE IMPOSITION OF THE DEATH PENALTY, DOES NOT VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS A CLEAR READING OF THIS COURT'S PRIOR PRECEDENTS MAKES PLAIN; THE INSTANT QUESTION WAS NOT PROPERLY PRESENTED TO THE STATE COURTS, GIVEN HILDWIN'S FAILURE TO RAISE THE MATTER IN THE TRIAL COURT, AS REQUIRED BY FLORIDA PROCEDURE.

Before proceeding to the merits of petitioner's claim, the State would initially contend that Hildwin has failed to demonstrate that the matter is properly before this Court. This Court has repeatedly held that when the highest court of a state has failed to pass upon a federal question, it will be presumed that the omission was due to the absence of presentation in the state courts, unless the aggrieved party can make an affirmative showing to the contrary. See, Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 372 (1969); Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981). As noted infra, Hildwin failed to present this claim to the state trial court as required by Florida procedure, see, Eutzy, supra, and the Supreme Court of Florida did not expressly resolve this

claim on the merits in its opinion. The fact that petitioner has received the death penalty does not, standing alone, relieve him of the necessity to comply with Florida's rules of procedure. Cf., Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986).

The Supreme Court of Florida's summary disposition of this claim, albeit in an opinion whose concluding sentence states that no merit has been found in any of petitioner's claims, is consistent with a finding of procedural default as to this matter. When confronted with the state's procedural arguments on appeal, Hildwin could cite to no portion of the record indicating proper preservation, choosing instead to characterize the issue as a "fundamental" one. While the state agrees fully with the fundamental significance of the traditional constitutional right to jury trial which Hildwin now wishes to assert and greatly expand, the alleged genesis of Hildwin's claim in the Sixth Amendment cannot serve to confer preservation where such does not otherwise exist. Even should petitioner's claim seem to possess any surface appeal to this court, the instant case hardly represents an appropriate candidate for review, given the questionable preservation of the issue, as well as its summary disposition below. Certainly, the courts of the state of Florida, trial as well as appellate, have a valid state interest in being afforded an adequate opportunity to pass upon challenges to their capital sentencing procedure prior to the time that such claims are presented to this, or any other federal, court for review. Cf., Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The instant petition for writ of certio ari should be denied.

In any event, the primary basis for denial of review should be the fact that the question presented by Hildwin would seem , largely, to have already been resolved by this Court's prior precedents. While petitioner initially asks whether this Court's decision in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) resolved "every possible constitutional challenge" to Florida's death penalty procedure, no one has ever

claimed that Proffitt did so. The question presented by Hildwin is simply insubstantial. The simple truth remains that in Proffitt, this Court most definitely did expressly conclude that Florida's trifurcated capital sentencing procedure is constitutional. Such holding can obviously be read to suggest that Hildwin's sentence of death, which was imposed following the return of an unanimous recommendation of death by the jury, which was in turn followed by the finding by the trial judge of four aggravating circumstances and nothing in mitigation and, finally, by review by the Supreme Court of Florida, is constitutional. While it is true, as Petitioner Hildwin notes, that the Proffitt decision did not expressly pass upon the question which he now presents -- whether the jury must "find" the statutory aggravating factors in a capital sentence -- it is likewise true that in passing upon the constitutionality of Florida's capital legislation, this Court was cognizant of the fact that, in Florida, the judge, as opposed to the jury, is not only the sole sentencer, but also is the only entity which makes express findings in aggravation or mitigation. Proffitt, 428 U.S. at 249-250, 253, 96 S.Ct. at 2965-2967. To respondent, it seems highly unlikely that this Court overlooked the existence of any fundamental constitutional defect in this process.

It is not, however, the state's position that one need only read Proffitt to resolve Hildwin's claim. Although Hildwin's petition makes no reference to certain subsequent decisions by this Court, there exists a number which involve not only Florida's capital sentencing statute, but which also would seem to conclusively lay to rest petitioner's concerns. The leading case in this regard, of course, is Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), in which this Court resolved "questions concerning the administration of Florida's capital sentencing statute". The primary "question" was the constitutionality of the jury override; Spaziano argued that allowing the judge to override the jury's recommendation of life violated not only the Eighth Amendment and the Fifth Amendment's Double Jeopardy Clause made applicable to the states through the

Fourteenth Amendment, but also "the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment." Id. at 459. In rejecting Speziano's argument, this Court held,

> The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause, however, does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial. The Court's concern in **Bullington** was with the risk that the State, with all its resources, would wear a defendant down, thereby leading to an erroneously imposed death penalty. 451 U.S., at 445, 101 S.Ct., at 1861. There is no similar danger involved in denying a defendant a jury trial on the sentencing issue of life or death. The sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant and the sentencer's decision for life is final. **Arizona v. Rumsey, supra**. More important, despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding--a determination of the appropriate punishment to be imposed on an individual. **See Lockett v. Ohio**, 438 U.S. 586, 604-605, 98 S.Ct. 2954, 2964-2965, 57 L.Ed.2d 973 (1978) (plurality opinion); **Woodson v. North Carolina**, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion), citing **Pennsylvania ex rel. Sullivan v. Ashe**, 302 U.S. 51, 55, 58 S.Ct. 59, 60, 82 L.Ed.2d 43 (1937), and **Williams v. New York**, 337 U.S. 241, 247-249, 69 S.Ct. 1079, 1083-1084, 93 L.Ed. 1337 (1949). The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.

Speziano, 468 U.S. at 460, 104 S.Ct. at 3161. (Emphasis supplied).

Thus, although this Court in Speziano did not expressly resolve the claim in terms of Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 91 (1968), that precedent was discussed earlier in the opinion. Speziano, 468 U.S. at 459, 104 S.Ct. at 3161. It certainly cannot be said that Speziano's Sixth Amendment claim was ignored nor that such analysis was not employed.

Speziano holds that a death sentence in Florida may constitutionally be imposed in the absence of any finding in

aggravation or recommendation of death by the jury. Speziano's sentence of death is obviously predicated solely upon the sentencing judge's findings in aggravation, and this Court has found such result permissible. Indeed, in resolving Speziano's claim of double jeopardy, this Court further stated,

> Our determination that there is no constitutional imperative that a jury have the responsibility of deciding when the death penalty should be imposed also disposes of petitioner's double jeopardy challenge to the jury override procedure. If a judge may be vested with sole responsibility for imposing the penalty, then there is nothing constitutionally wrong with the judge's exercising that responsibility after receiving the advice of the jury. The advice does not become a judgment simply because it comes from the jury.

Speziano, 468 U.S. at 466, 104 S.Ct. at 3165.

If the jury's advisory verdict is not a "judgment" for the above purposes, then it would hardly seem to follow, as petitioner insists, that there is a constitutional requirement that such verdict contain findings of fact. It should also be noted that while three members of this Court dissented in part from the Speziano decision, their difference with the majority would appear to be rooted in their conviction that the Eighth Amendment mandates that the jury be the final sentencer, as opposed to any misgiving as to the procedural aspects of the jury override system. Speziano v. Florida, 468 U.S. 447, 484 (Stevens, J., joined by Brennan and Marshall, J.J., concurring in part, dissenting in part). Hildwin presents no claim based upon the Eighth Amendment.

In addition to Speziano, two more recent decisions, one of them cited by petitioner, contain holdings contrary to Hildwin's position. (Pet. at 5 [cite to McMillan v. Pennsylvania, 477 U.S. 79 (1986)]) Thus, in Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), this Court held that there was no constitutional requirement that a sentencing jury, as opposed to a sentencing judge or even an appellate court, make the requisite finding of fact that one sentenced to death had actually killed,

attempted to kill, or intended to kill, as required by Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Indeed, in distinguishing one of its prior decisions, Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978), this Court observed,

> In reversing as well the death sentence on the ground that the Georgia Supreme Court could not find an aggravating factor on a theory on which the jury had not been instructed, the Presnell Court appeared to assume that the jury's constitutional role in determining sentence was equivalent to its role in determining guilt or innocence. This assumption, of course, is no longer tenable in light of our holding in Spaziano v. Florida, 468 U.S. ___, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

Bullock, 474 U.S. at ___, n. 4, 106 S.Ct. at 698, n. 4.

The scope of the holding in Spaziano was further explicated in McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). In such case, the petitioner had argued that possession of a firearm should be treated as an element of the underlying criminal offense, as opposed to a sentencing consideration, thus requiring a jury finding before any enhanced sentence could be imposed. This Court rejected such argument and, in language highly pertinent to the question presented sub judice, observed,

> Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of facts. See, Spaziano v. U.S., at ___, 104 S.Ct., at ___.

McMillan, 477 U.S. at ___, 106 S.Ct. at 2420. (Emphasis supplied).

Mildwin's reliance upon the McMillan case is particularly puzzling (see Pet. at 5), since the gravamen of his asserted claim would seem to have been squarely rejected by United States Supreme Court precedent.

In conclusion, petitioner has failed to demonstrate any basis for this Court's review of the decision below. Petitioner

never presented his claim to the state circuit court as required by state procedure and he has failed to demonstrate that he received a ruling on the merits from the Supreme Court of Florida. Assuming that that court did at all consider petitioner's claim on the merits, its summary rejection of such would have been in accordance with the precedents of this Court cited above.

Mildwin's argument, however phrased, represents an unwillingness to accept, or even cite or acknowledge, this Court's holding in Spaziano, a holding to which this Court has continually adhered. Mildwin's appellate attorney would prefer a capital sentencing structure in which the jury makes express findings in aggravation. This argument was presented to the Florida Legislature in 1972 and rejected. Petitioner's continued dissatisfaction with a system which has worked for seventeen years, and which has been continually held to be constitutional during such period, presents no basis for review. The instant petition for writ of certiorari should be denied in all respects.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied in all respects.

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NO. 88-6066

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APPENDIX

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INDEX TO APPENDIX

Thus, there was no ex post facto violation as Peters was not penalized to a greater extent by use of rule 3.701(d)(14) than he would have been had the rule not been enacted.

Accordingly, we approve the opinion of the Second District Court of Appeal. To the extent they are in conflict with this opinion, we disapprove *Cummins v. State*, 519 So.2d 718 (Fla. 5th DCA 1988) and *Green v. State*, 513 So.2d 794 (Fla. 4th DCA 1987).

It is so ordered.

EHRLICH, C.J., and OVERTON, SHAW, BARKETT and GRIMES, JJ., concur.

McDONALD, J., concurs in result only.

Paul C. HILDWIN, Appellant,

v.

STATE of Florida, Appellee.

No. 69513.

Supreme Court of Florida.

Sept. 1, 1988.

Rehearing Denied Oct. 17, 1988.

Defendant was convicted in the Circuit Court, Hernando County, L. R. Huffstetler, Jr., J., of first-degree murder. Defendant appealed. The Supreme Court held that: (1) juror, who arrived at courthouse early before first day of testimony and inadvertently saw sheriff's deputies take defendant from van, was not subject to removal for cause; (2) evidence of defendant's uncharged act of violence was admissible in penalty phase of capital case to rebut defense evidence of nonviolent nature, arrests or criminal charges, and (3) evidence established that strangulation was especially heinous, atrocious, and cruel.

Affirmed.

Barkett, J., concurred in result.

1. Jury ⇐149

Juror who arrived at courthouse early before first day of testimony and inadvertently saw sheriff's deputies take defendant from van was not subject to removal for cause.

2. Jury ⇐135

Defendant's motion to disqualify unsworn juror, who arrived at courthouse early before first day of testimony, but after voir dire, and saw sheriff's deputies take defendant from van, was challenge for cause, rather than peremptory challenge.

3. Jury ⇐149

Juror's catching inadvertent sight of defendant in handcuffs, chains, or other restraints is not so prejudicial as to require new trial.

4. Criminal Law ⇐664

Trial court improperly responded to deliberating jury's written question about factual matter when judge failed to return jury to courtroom and merely wrote response on jury's note and returned it to jury. West's F.S.A. RCrP Rule 3.410.

5. Criminal Law ⇐1174(5)

Trial judge's improper response to deliberating jury's question about factual matter when judge failed to return jury to courtroom and merely wrote answer on jury's note was harmless error; both attorneys were notified and given opportunity to make their positions known to judge. West's F.S.A. RCrP Rule 3.410.

6. Criminal Law ⇐1208.1(6)

Direct evidence of defendant's uncharged, specific act of violence was admissible in penalty phase of capital case to rebut evidence of defendant's nonviolent nature, but in absence of conviction, jury was not to be told of any arrests or criminal charges.

7. Homicide ⇐354

Evidence in penalty phase of capital case established slowness and brutal nature of strangulation death and established heinous, atrocious, and cruel nature of the murder after an abduction and rape.

8. Homicide ⇐354

Description in defendant's statement to investigator that victim's killer had cross tattooed on back was sufficient indicia of reliability due to fact that defendant had cross tattooed on back and could be considered by judge in penalty phase of capital murder prosecution despite conflicting nature of some statements.

9. Homicide ⇐354

Evidence in penalty phase of capital murder prosecution established that defendant killed victim to get money from her; defendant had no money and needed to search for pop bottles to buy gas to get home; and after victim's death defendant had victim's property and cashed forged check on her account.

James B. Gibson, Public Defender and Larry B. Henderson, Asst. Public Defender, Seventh Judicial Circuit, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen. and Paula C. Coffman, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Appellant, Paul C. Hildwin, Jr., appeals his conviction by a jury for first-degree murder and the death sentence imposed by the trial court. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant was arrested after cashing a check purportedly written to him by one Vronsettie Cox, a forty-two-year-old woman whose body had been found in the trunk of her car, which was hidden in dense woods in Hernando County. Death was due to strangulation; she also had been raped. Evidence indicated she had been killed in a different locale from where her body was found. Her purse, from which some contents had been removed, was found in dense woods, directly on line between her car and appellant's house. A pair of semen-encrusted women's underpants was found on a laundry bag in her car, as was a sweat-stained wash rag. Analysis showed the semen and sweat came from nonsecretor (i.e., one who does not secrete blood into other bodily fluids). Appellant, a white male, was found to be a nonsecretor; there was testimony that white male nonsecretors make up eleven percent of the population.

The victim had been missing for four days when her body was found. The man she lived with, one Haverty, said she had left their home to wash clothes at a coin laundry. To do so, she had to pass a convenience store. Appellant's presence in the area of the store on the date of her disappearance had come about this way: He and two women had gone to a drive-in movie, where they had spent all their money. Returning home early in the morning, their car ran out of gas. A search of the roadside yielded pop bottles, which they redeemed for cash and bought some gasoline. However, they still could not start the car. After spending the night in the car, appellant set off on foot at 9 a.m. toward the convenience store near the coin laundry. He had no money when he left, but when he returned about an hour and a half later, he had money and a radio. Later that day, he cashed a check (which he later admitted forging) written to him on Ms. Cox's account. The teller who cashed the check remembered appellant cashing it and recalled that he was driving a car similar to the victim's.

The check led police to appellant. After arresting him the police searched his house, where they found the radio and a ring, both of which had belonged to the victim. Appellant gave several explanations for this evidence and several accounts of the killing, but at trial testified that he had been with Haverty and the victim while they were having an argument, and that when Haverty began beating and choking her, he left. He said he stole the checkbook, the ring, and the radio. Haverty had an alibi

for the time of the murder and was found to be a secretor.

Appellant made two pretrial statements that are pertinent here. One was a confession made to a cellmate. The other was a statement made to a police officer to the effect that Ms. Cox's killer had a tattoo on his back. Haverty had no such tattoo, but appellant did.

During the penalty phase the state introduced evidence that appellant previously had been convicted of violent felonies in New York and that he was on parole. Appellant's case consisted of testimony from his father, a couple that had raised him after his father had abandoned him, and a friend. The thrust of their testimony was that he had not been a violent person in their dealings with him. In rebuttal the state called a woman who testified that appellant had, five months before Ms. Cox was murdered, committed sexual battery on her. She admitted she had not reported the crime. The jury recommended death by a unanimous vote.

In his order imposing the death sentence, the trial judge found four aggravating circumstances: that appellant had previous convictions for violent felonies; that appellant was under a sentence of imprisonment at the time of the murder; that the killing was committed for pecuniary gain; and that the killing was especially heinous, atrocious, and cruel. He found nothing in mitigation.

Appellant alleges numerous errors pertaining to both guilt and sentence. We find that some merit discussion.

GUILT PHASE

Issue I: An unsworn juror's catching sight of appellant in the custody of the sheriff.

[1] Before the first day of testimony, but after voir dire, a juror arrived at the courthouse early and saw the sheriff's deputies taking appellant from the van that had transported him from the jail. Appellant told his lawyer, who made a motion to disqualify this juror. The panel had not been sworn at this time. In chambers the trial judge and defense counsel questioned the juror, who testified that he drew no inferences from seeing appellant in custody and had not talked to any other jurors about the incident. The judge denied the motion.

The central issue here is one of perception. Appellant now argues that because trial counsel had not exhausted his peremptory challenges, and because the panel had not yet been sworn, the motion to disqualify should be seen as an attempt to backstrike, which the court had no authority to deny. *See Rivera v. State*, 458 So.2d 762 (Fla.1984); *Jones v. State*, 332 So.2d 615 (Fla.1976). The state points out that defense counsel never used the words "peremptory challenge" and that this was not the nature of his effort to disqualify the juror.

[2] The defense motion was not a peremptory challenge. The defense in a criminal trial need give no reason for exercising its peremptory challenges. It is clear that this was a challenge for cause directed toward the possible taint which may have been caused by the juror seeing appellant in the custody of law enforcement. Thus, the inquiry must focus on whether the denial of the challenge was error.

[3] Our review of the record persuades us that the judge did not abuse his discretion in failing to strike the juror for cause. It is apparent from his answers to questions posed by the judge and counsel that the juror had not made much of the incident and had told none of his fellow jurors. A juror's catching inadvertent sight of a defendant in handcuffs, chains or other restraints (what the juror saw in this regard is not clear) is not so prejudicial as to require a new trial. *Heiney v. State*, 447 So.2d 210 (Fla.), *cert. denied*, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); *Neary v. State*, 384 So.2d 881 (Fla.1980).

Issue II: The jury being instructed by the judge by means of a note sent to the jury room.

[4] While the jury was deliberating appellant's guilt, it sent a note to the judge asking: "The distance from his home to

where the car was found?" The judge called counsel into chambers and informed both sides of the request. He told them he proposed to answer as follows: "You must rely on your memory of the testimony." After both counsel concurred with the response, the judge wrote it on the jury's note and returned it to the jury. The judge did not bring the jury into the courtroom, and there is no indication that the defendant was present in chambers. Appellant seeks the application of the per se rule of reversal established in *Ivory v. State*, 351 So.2d 26 (Fla.1977).

[5] The Florida Rules of Criminal Procedure are explicit on this point.

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them such additional instructions or may order such testimony read to them. Such instructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

Fla.R.Crim.P. 3.410. The question the jury asked was within the scope of the rule. *See Curtis v. State*, 480 So.2d 1277 (Fla. 1985). However, unlike *Ivory* and *Curtis*, both counsel were notified and given the opportunity to make their positions known to the judge. Therefore, the only violation of the rule occurred when the judge failed to return the jury to the courtroom. Under the circumstances, this was harmless error. *See Meek v. State*, 487 So.2d 1058 (Fla. 1986); *Stano v. State*, 473 So.2d 1282 (Fla. 1985), *cert. denied*, 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986). Clearly, the appellant suffered no prejudice.

PENALTY PHASE

Issue III. Introduction of rebuttal evidence of an uncharged crime.

[6] Appellant points out that he was not charged with sexual battery in the incident testified to by the state's witness. Therefore, he argues that testimony concerning the alleged attack was inadmissible because it is evidence of collateral crimes, and its presentation to the jury was error. The state responds that the appellant opened the door to this type of evidence by mounting a case that dealt with his nonviolent nature; this incident was relevant to rebut that claim.

At the outset, it must be remembered that there is a different standard for judging the admissibility and relevance of evidence in the penalty phase of a capital case, where the focus is substantially directed toward the defendant's character. *See* § 921.141(1), Fla. Stat. (1987). In *Elledge v. State*, 346 So.2d 998, 1001 (Fla.1977), we pointed out that

> the purpose of considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case.

Thus, evidence that would not be admissible during the guilt phase could properly be considered in the penalty phase. *Alford v. State*, 322 So.2d 533, 535 (Fla.1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976).

Section 921.141(1), Florida Statutes (1987), relating to sentencing proceedings, provides that

> evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

As noted in *Alford*, "[t]here should not be a narrow application or interpretation of

the rules of evidence in the penalty hearing, whether in regard to relevance or any other matter except illegally seized evidence." 322 So.2d at 539 (citing *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied and now, Hawkes v. Florida*, 416 U.S. 943, 94 S.Ct. 1956, 40 L.Ed.2d 286 (1974)).

Because no conviction was obtained, evidence such as that introduced in the instant case has been deemed inadmissible to prove the aggravating circumstance of committing a previous violent felony. *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). On the other hand, even where the defendant waived the mitigating circumstance of no prior criminal activity, the state was allowed to bring out the defendant's prior misconduct when the defendant opened the door by introducing evidence of his nonviolent character. *Parker v. State*, 476 So.2d 134 (Fla.1985). We hold that, during the penalty phase of a capital case, the state may rebut defense evidence of the defendant's nonviolent nature by means of direct evidence of specific acts of violence committed by the defendant provided, however, that in the absence of a conviction for any such acts, the jury shall not be told of any arrests or criminal charges arising therefrom.[1] *Cf. Squires v. State*, 450 So.2d 208 (Fla.) (in guilt phase of trial, state was permitted to rebut evidence of nonviolent character by showing that defendant had fired a deadly weapon at persons other than the victim), *cert. denied*, 469 U.S. 892, 105 S.Ct. 268, 83 L.Ed.2d 204 (1984). The court did not err in permitting the rebuttal evidence of the separate incident of sexual battery. Such evidence was more reliable than the reputation evidence which was condemned in *Drugovich v. State*, 492 So.2d 350 (Fla.1986).

Issue IV: The finding that the killing was especially heinous, atrocious, and cruel.

[7] The trial judge found that the killing was "especially wicked, evil, atrocious or cruel." To support this finding, the judge made two major points: First, the victim took several minutes to lose consciousness and would have been aware during that time of her impending doom. Second, she was brutally attacked, as evidenced by the torn bra found with the body and by the statement appellant gave to Investigator Phifer that she screamed and begged for help while she was strangled, and that her face turned blue before she lost consciousness.

Appellant argues that because there were no defensive wounds found on the body and because the other evidence of the killing, such as the time it took the victim to die, was not conclusively established, the judge engaged in mere speculation. Appellant argues that the evidence is just as consistent with the premise that the victim died during an especially physical, but nonetheless consensual, sexual encounter.

[8] We disagree that the evidence does not support the judge's finding. The killing clearly meets the test set forth in *Dixon*, which requires that the murder be accompanied by additional acts that make the crime pitiless and unnecessarily torturous to the victim. 283 So.2d at 9. We have often found that strangulation murders meet this test, and we are not prepared to say that this case, where the evidence points convincingly to a conclusion that the appellant abducted, raped, and slowly killed his victim, does not measure up to that standard.[2] This is especially true in light of the fact that appellant made his victim "acutely aware of [her] impending [death]." *Cooper v. State*, 492 So.2d 1059,

1. We hasten to add that evidence that the defendant had been a devoted family man or a good provider would not place in issue his reputation for nonviolence.

2. As did the trial judge, we rely in part on appellant's own statement to Investigator Phifer regarding the killing of Vronnette Cox. While the appellant gave several statements which were somewhat conflicting, this fact alone does not prevent a court from considering those parts of the statement that bear an indicia of reliability. *Johnson v. State*, 465 So.2d 499, 506 (Fla.), *cert. denied*, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985). The indicia of reliability in the statement given to Investigator Phifer is that it describes the killer as having a cross tattooed on his back, as appellant does. Also, the statement was very detailed.

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1062 (Fla.1986), *cert. denied*, 479 U.S. 1101, 107 S.Ct. 1230, 94 L.Ed.2d 181 (1987). *See also Pietri v. State*, 502 So.2d 416, 421 (Fla.1986), *cert. denied*, — U.S. —, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987); *Johnson v. State*, 465 So.2d 499, 507 (Fla.), *cert. denied*, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985). The aggravating circumstance that the killing was especially heinous, atrocious, or cruel was established by the evidence in the record beyond a reasonable doubt.

Issue V: The finding that the killing was committed for pecuniary gain.

[9] Relying on the fact that appellant admitted forging one of the victim's checks, the fact that he testified that he needed money, and the fact that he was in possession of the victim's ring and radio, the trial judge found the aggravating factor that the killing was committed for pecuniary gain.

Appellant attacks this finding, saying that while proof of possession of recently stolen property raises an inference that the possessor stole it, possession alone does not prove that the goods were stolen by the defendant. Appellant argues that the circumstantial evidence in this case does not rebut all reasonable hypotheses to the contrary.

We disagree. The evidence, while circumstantial that appellant killed Ms. Cox to get money from her, is substantial. Before he killed Ms. Cox, appellant had no money and was reduced to searching for pop bottles on the road side to scrape up enough cash to buy sufficient gas to get home. After her death he had her property and had forged and cashed a check on her account. The record supports the judge's finding beyond a reasonable doubt that the killing was committed for pecuniary gain.

REMAINING POINTS ON APPEAL

We reject without discussion Hildwin's other arguments: (1) that the trial judge should have instructed the jury as to the minimum and maximum possible penalties; (2) that a witness who had not explicitly testified to a lack of present recollection should not have been permitted to read from notes taken at the time of a conversation; (3) that the evidence was insufficient to sustain the jury's finding of guilt; (4) that the testimony of a state witness regarding his criminal record was improper; (5) that the state should have been required to furnish criminal records of all its witnesses; (6) that the death penalty was unconstitutionally imposed because the jury did not consider the elements that statutorily define the crimes for which the death penalty may be imposed; (7) that the jury instructions on aggravating and mitigating circumstances were misleading; and (8) that the sentencing order was not specific enough.

As we find no merit in any of appellant's arguments, we affirm the judgment of guilt and sentence of death.

It is so ordered.

EHRLICH, C.J., and OVERTON, McDONALD, SHAW, GRIMES and KOGAN, JJ., concur.

BARKETT, J., concurs in result only.

Joseph Anthony CICCARELLI, Petitioner,
v.
STATE of Florida, Respondent.
No. 70811.
Supreme Court of Florida
Sept. 8, 1988.

The District Court of Appeals, 509 So.2d 52, certified question. The Supreme Court, Barkett, J., held that each appellate judge evaluating assertion of harmless error in criminal appeal must independently read trial record.

EXCERPT FROM INITIAL BRIEF OF APPELLANT

IN THE SUPREME COURT OF FLORIDA

PAUL HILDWIN,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

Case NO. 69,513

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HERNANDO COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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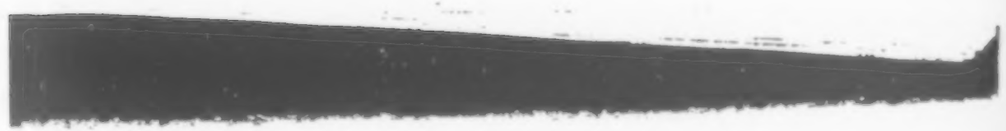
POINT IV

THE DEATH PENALTY WAS IMPOSED IN CONTRAVENTION OF THE RIGHTS TO DUE PROCESS AND A JU. TRIAL GUARANTEED BY THE C..STITUTIONS OF FLORIDA AND THE UNITED STATES, IN THAT IN RENDERING ITS VERDICT THE JURY DID NOT CONSIDER THE ELEMENTS THAT STATUTORILY DEFINE THE CRIME FOR WHICH THE DEATH PENALTY MAY BE IMPOSED.

This Court has expressly stated "[T]he aggravating circumstances of Section 921.141(6), Florida Statutes actually define those crimes, when read in conjunction with Florida Statutes 782.04(2) . . . to which the death penalty is applicable in the absence of mitigating circumstances." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). This Court has further held "that the provisions of Section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty." Vaught v. State, 410 So.2d 147, 149 (Fla. 1982).

> . . . . The aggravating and mitigating circumstances enumerated in section 921.141 are substantive law. (citations omitted). "The aggravating circumstances of Fla.Stat. § 921.141(6) F.S.A., [sic] actually define those crimes—when read in conjunction with Fla.Stat. §§ 782.04-(1) and 794.01(1), F.S.A.—to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury." [State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)]. To the extent that section 921.141 pertains to procedural matters such as the bifurcated nature of the trial in capital cases, it has been incorporated by reference in Florida Rule of Criminal Procedure 3.780, promulgated by this Court, and is therefore properly adopted. (citation omitted).

Morgan v. State, 415 So.2d 6, 11 (Fla. 1982).



Thus, the ..orida death penalty statu. s necessarily and unequivocally establish a constitutional right to jury determination of the presence of statutory aggravating circumstances. The recognition by this Court that the statutory aggravating circumstances are substantive elements "that define those capital felonies which . . . deserve the death penalty", Vaught, supra, at 149, acknowledges that without proving these elements the state has not proved a crime that is punishable by death. See Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). The "beyond a reasonable doubt" standard of proof connotes the importance of aggravating circumstances as substantive elements of the crime. See In re Winship, 397 U.S. 358 (1970).

A defendant convicted of first-degree murder in Florida has not had a jury determine facts comprising substantive elements that are required by statute to be proved beyond a reasonable doubt before imposition of the death penalty. When the verdict is rendered by the jury a defendant cannot receive the death penalty because he has not been convicted of a crime containing all the statutory elements defining an offense for which the death penalty may be imposed. He has been convicted of murder, but he has not been convicted of a crime that is necessarily punishable by death. Only after additional statutory elements are proved beyond a reasonable doubt may the state obtain the death penalty against the defendant.

The state of Oklahoma has a death penalty statute that contains substantially the same aggravating circumstances as

those found in Florida's death penalty statute. Compare Section 921.141, Florida Statute to 21 Okla. Stat. Section 701.12. Significantly, however, the procedure in Oklahoma requires unanimous jury determination of aggravating circumstances.

> In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases, the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sente..ce of imprisonment for life.

21 Okla. Stat. Section 701.11. It is not herein submitted that a unanimous jury recommendation must exist in Florida prior to imposition of the death penalty by a judge in Florida. However, it is submitted that the jury must unanimously determine the presence of at least one or more aggravating circumstances as a fundamental principle of Due Process before a death sentence can be imposed.

By way of analogy, this Court is respectfully asked to consider the following hypothetical procedure: A defendant is charged with theft. A jury is instructed that if the defendant

knowingly takes or endeavors to take property belonging to another with the intent to deprive him thereof, he has committed theft. The jury returns a verdict of guilty. In a subsequent proceeding the jury is instructed that if a majority of them find that the stolen property was worth $100.00 or more, was a horse or cow, was a firearm, was a fire extinguisher, or was a will or codicil, etc. pursuant to Section 812.014(2)(b),1 - 8 Fla. Stat. (1985), it may recommend that the defendant be sentenced for a third-degree felony. A majority recommendation is made and the judge sentences the defendant to five years imprisonment. The defendant's right to jury determination of substantive elements of the crime has been circumvented. This is precisely what is happening in the death penalty context.

In State v. Overfelt, 457 So.2d 1385 (Fla. 1984) this Court stated the following:

> The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in such cases as this where the defendant was charged with but not convicted of a crime involving a fire-arm.

Overfelt at 1387 (emphasis added). Statutory aggravating circumstances set forth in section 921.141 involve "matters concerning

the criminal episode". Examples include whether the defendant knowingly created a great risk of death to many persons, whether the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody, or was committed for pecuniary gain, whether the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, whether the capital felony was especially heinous, atrocious or cruel, or whether the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

In McMillan v. Pennsylvania, 477 U.S.__, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), the United States Supreme Court held that the Due Process clause of the United States Constitution does not require the state to prove visible possession of a firearm beyond a reasonable doubt since the statute neither altered the maximum penalty for the crime committed nor created a separate offense calling for a separate penalty, but operated solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it. McMillan, 91 L.Ed.2d at 77. In the context of the death penalty, however, the sanction of the death penalty is not available to the state following conviction for a capital offense; it cannot be obtained unless and until an aggravating circumstance is subsequently found to exist beyond a reasonable doubt. Thus, determination of the presence of an aggravating circumstance "ups the ante" for the defendant by raising the available punishment from that of

life imprisonment to that of the death penalty. Imposition of the death penalty is not a limitation on the trial court's discretion. Rather, it is an extension of its power. This fact effectively distinguishes McMillan.

In Florida an offense can be labeled a "capital offense" even though the death penalty is wholly unattainable following conviction for the offense. See State v. Hogan, 451 So.2d 844 (Fla. 1984). A capital offense for which the death penalty may be imposed is an offense that is sui generis.

It is respectfully submitted that because the jury did not determine the presence of the statutory aggravating circumstance that are substantive elements defining the capital offenses for which the death penalty may be imposed, the imposition of the death penalty violated the defendant's rights to due process and a jury trial guaranteed under the Florida and Federal Constitutions. Accordingly, the sentence of death must be reversed.

IN THE SUPREME COURT OF FLORIDA

PAUL CHRISTOPHER HILDWIN,

Appellant,

vs. CASE NO. 69,513

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR HERNANDO COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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POINT FOUR

APPELLANT'S SENTENCE OF DEATH WAS NOT UNCONSTITUTIONALLY IMPOSED AS A RESULT OF THE FAILURE OF APPELLANT'S JURY TO UNANIMOUSLY DETERMINE THE APPLICABILITY OF AT LEAST ONE STATUTORY AGGRAVATING CIRCUMSTANCE TO APPELLANT'S CRIME; MOREOVER, THE INSTANT CLAIM OF ERROR WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW.

Prior to addressing the merits of the instant claim of error, appellee notes that the argument presently advanced in the initial brief of appellant contains not a single citation to the record on appeal. Although appellant presently maintains that a sentence of death was unconstitutionally imposed upon him as a result of the failure of appellant's jury to unanimously determine the applicability of at least a single statutory aggravating circumstance to appellant's crime, review of the record on appeal reveals that this issue was never raised below. This court has previously observed that, unless the constitutionality of a statute as applied to a particular set of facts is first raised at the trial court level, such an asserted claim of error has not properly been preserved for appellate review. Trushin v. State, 425 So.2d 1126 (Fla. 1982). As a consequence, appellee would urge this court to decline to review the instant claim presently presented for the first time on appeal.

Assuming arguendo that appellate review of the instant claim has not been waived by virtue of the appellant's election to raise same for the first time upon direct review of his conviction for first-degree murder and sentence of death,

appellee would point out that a similar issue has recently been presented for this court's consideration in the case of Remeta v. State, Florida Supreme Court Case No. 69,040.[15] As in Remeta, appellant presently maintains that "...the Florida death penalty statutes necessarily and unequivocally establish a constitutional right to jury determination of the presence of statutory aggravating circumstances (emphasis supplied)." See, Initial Brief of Appellant, page 33. According to appellant's theory, since the applicability of at least one statutory aggravating circumstance to the appellant's crime must be proved beyond a reasonable doubt before a sentence of death may be imposed, statutory aggravating circumstances are hence elements of capital offenses, requiring unanimous jury determination of the existence of one such element[16] in order to afford due process to the criminal defendant charged with a capital felony. For the reasons expressed below, appellee must respectfully disagree with appellant's novel interpretation of Florida capital sentencing law.

Appellant incorrectly asserts that a defendant convicted of

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[15]Oral argument in the case is presently scheduled to be heard on September 2, 1987.

[16]It is unclear from appellant's argument whether the unanimous jury determination regarding the existence of a statutory aggravating circumstance must also be unanimous with respect to the applicability of a particular circumstance. Nevertheless, for purposes of the instant argument, appellee will assume that appellant's position requires the jury's unanimous agreement that at least one, although not necessarily the same, statutory aggravating circumstance is applicable to a capital felon's crime.

first-degree murder in Florida "...cannot receive the death penalty because he has not been convicted of a crime containing all the statutory elements defining an offense for which the death penalty may be imposed." See, Initial Brief of Appellant, page 33. While the elements required to be proved to support a conviction for first-degree murder remain the same, separate sentencing criteria define those instances where the imposition of a sentence of death is appropriate. However, section 921.141, Florida Statutes (1985), does not alter the maximum penalty for the offense of first-degree murder. In this regard, "[t]his court has long held that a capital crime is one in which the death penalty is possible (emphasis supplied)." Rusaw v. State, 451 So.2d 469, 470 (Fla. 1984). Every conviction for first-degree murder in Florida involves a potential sentence of death. See, State v. Bloom, 492 So.2d 2 (Fla. 1986). As this court observed in Lightbourne v. State, 438 So.2d 380 (Fla. 1983), the aggravating circumstances ultimately required to support the imposition of a sentence of death need not be alleged in an indictment charging a defendant with a capital felony in order to confer jurisdiction on the trial court to subsequently impose a sentence of death. This result obtains because, in Florida, it is the judge and not the jury who makes the ultimate determination concerning the appropriate sentence to be imposed in a given case.

Jury unanimity in recommending the death penalty is not required under Florida's capital sentencing scheme. James v. State, 453 So.2d 786 (Fla. 1984). Moreover, a jury

recommendation, be it for death or for life imprisonment, is not binding on the trial court judge, Lusk v. State, 446 So.2d 1038 (Fla. 1984), with whom the ultimate responsibility for determining the appropriate sentence is reposed by statute. Thomas v. State, 456 So.2d 454 (Fla. 1984); Thompson v. State, 456 So.2d 444 (Fla. 1984); Clark v. State, 443 So.2d 973 (Fla. 1983); Engle v. State, 438 So.2d 803 (Fla. 1983); Hoy v. State, 353 So.2d 826 (Fla. 1977); §921.141(3), Fla. Stat. (1985).

This court has previously held that a defendant possesses no constitutional right to be sentenced by a jury. Brown v. State, 497 So.2d 2 (Fla. 1986) [citing Spaziano v. Florida, ____ U.S. ___, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984)]. "Appellant's argument that due process requires that a jury's recommendation for life or death be accompanied by reasons in writing is without merit. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)." Brown v. State, 473 So.2d 1260, 1271 (Fla. 1985). Although, under Florida's bifurcated system, the trial court is assisted and guided by the jury's recommendation in making its ultimate sentencing determination, the trial court's ultimate rejection of a jury's recommendation for life imprisonment does not subject a convicted capital defendant to double jeopardy. Brown v. State, 473 So.2d 1260 (Fla. 1985); Cannady v. State, 427 So.2d 723 (Fla. 1983).

It is respectfully submitted that by its unanimous recommendation of the appellant's death for the murder of Vronzettie Cox (R 1387), the jury was in unanimous agreement that at least one statutory aggravating circumstance which was not

outweighed by circumstances in mitigation was applicable to the appellant's crime. The trial court subsequently found four aggravating circumstances to have been proven beyond and to the exclusion of a reasonable doubt (R 1394-1396). Consequently, if any error whatsoever can be gleaned from the appellant's unpreserved claim concerning the unconstitutional application of Florida's capital sentencing scheme to his case, appellee would assert that any such error was harmless and should not entitle appellant to the requested resentencing. §§921.141(3) and 924.33, Fla. Stat. (1985). Appellant's sentence of death should therefore be affirmed.

EXCERPT FROM REPLY BRIEF OF APPELLANT

IN THE SUPREME COURT OF FLORIDA

PAUL C. HILDWIN, Appellant,	)	
vs.	)	CASE NO. 69,513
STATE OF FLORIDA, Appellee.	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HERNANDO COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

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Court's decisions or by the decisions of the United States Supreme Court.

This issue was neither identified nor discussed by this Court in the opinion deciding Peede, supra. However, in Provenzano this Court said:

> Appellant's contention that the sixth amendment right to a jury trial is violated by Florida's death penalty procedure because the trial court determines the facts anew after the jury issues its recommendation is without merit. The United States Supreme Court recently recognized the validity of the trial judge's power to impose the death sentence. Spaziano v. State, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Further, the trial judge does not consider the facts anew. In sentencing a defendant, a judge lists reasons to support a finding in regard to mitigating or aggravating circumstances. These reasons are taken from all the evidence in the case and any further evidence presented at the time of sentencing. Moreover, the sentence of death is not unconstitutional as applied.

Provenzano at 1185. Though identifying the basic issue, this Court's discussion is couched in terms of the Fifth Amendment proscription against double jeopardy. The citation to Spaziano supports the conclusion that the trial judge has the power to impose a death sentence over a jury recommendation of life and that jury sentencing is not constitutionally required, but Hildwin does not here contest the trial judge's power to impose the death penalty over a jury recommendation of life; neither does he contend that the jury must sentence the defendant. Rather, it is respectfully submitted that the protections afforded the defendant by a jury trial are such that the defendant has

a Sixth Amendment right to jury determination of the presence of statutory aggravating circumstances. Significantly, the United States Supreme Court in Spaziano expressly noted that such grounds were not being argued by counsel in that case; Spaziano at 458.

The same fundamental reasoning used by this Court in State v. Overfelt, 457 So.2d 1385 (Fla. 1984) should apply here. Each statute on its face does not require that the jury determine the factual basis required to impose the more severe sanction but, as acknowledged by this Court in Overfelt, the constitution requires that such facts be determined by the jury: ". . . it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode." Overfelt at 1387. Procedural due process is not a static concept, but instead a dynamic process of evolution.

> For all its consequence "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." (Citation omitted). Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Dept. of Social Services, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 68 L.Ed.2d 640, 648 (1981).

In light of the far ranging consequences that this holding entails, this Court may wish to limit recognition of this right to those cases in the "direct appeal" posture pursuant to Griffin v. Kentucky, __U.S.__, 40 Cr.L. 3169 (1987). However, the sheer force of logic and precedent mandates that such recognition is necessary.

CASE NO. 88-6066

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PAUL C. HILDWIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I, RICHARD B. MARTELL, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Respondent's Brief in Opposition upon opposing counsel, by depositing same in the United States mail, first-class postage prepaid, to the following:

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All parties required to be served have been served on this 17 day of January, 1989.

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